Golden Manufacturing Co., Inc. *and* Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC. Case 26-CA-9138

15 July 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On 9 August 1982 Administrative Law Judge Howard Grossman issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified below.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Golden Manufacturing Co., Inc., Golden, Mississippi, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(b):

"(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act."

2. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly:

"(b) Expunge from its files any references to the layoff on 24 April 1981, and subsequent discharge on 1 May 1981, of Donna Young and the layoff on 11 May 1981, and subsequent discharge on 2 June 1981, of Sally Szczepanski, respectively, and notify them in writing that this has been done and that evidence of these unlawful layoffs and discharges will not be used as a basis for future personnel action against them."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT do anything to interfere with these rights.

WE WILL NOT lay off, discharge, or otherwise discriminate against employees because of membership in or activities on behalf of Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the Act.

WE WILL offer Donna Young and Sally Szczepanski full and immediate reinstatement to their former positions or, if such positions

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd.188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In accordance with our recent decision in *Sterling Sugars*, 261 NLRB 472 (1982), we shall modify the Administrative Law Judge's recommended Order by including therein the affirmative requirement that Respondent expunge from its records any reference to the unlawful layoff and discharge of Donna Young and Sally Szczepanski, respectively. Respondent shall also be required to provide written notice of such expunction to Young and Szczepanski, respectively, and to inform them that Respondent's conduct will not be used as a basis for future personnel actions against them.

In agreeing that Szczepanski was unlawfully discharged Member Hunter does not rely on the Administrative Law Judge's finding that Respondent's purported rule barring laid-off employees from working elsewhere, and instead requiring them to collect unemployment insurance benefits, "does not serve the public interest." Member Hunter notes that Respondent did not advise Szczpanski that this purported rule was a basis for her discharge, and that the shifting reasons given for her discharge appear to be pretextual.

no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, discharging if necessary any employee hired to replace either of them, and WE WILL make them whole for any loss of earnings they may have suffered because we laid them off and discharged them, by paying them backpay with interest.

WE WILL expunge from our files any references to the discriminatory layoffs and discharges of Donna Young and Sally Szczepanski, respectively, and WE WILL notify them that this has been done and that evidence of these unlawful layoffs and discharges will not be used as a basis for future personnel actions against them.

GOLDEN MANUFACTURING CO., INC.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge: The charge was filed on June 11, 1981,[1] by Amalgamated Clothing and Textile Workers Union, AFL-CIO (herein the Union). The complaint issued on July 15, and alleged that Golden Manufacturing Co., Inc. (herein Respondent), discharged employees Sally Szczepanski and Donna Young because of their union activities, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (herein the Act). A hearing was conducted before me on these matters in Belmont, Mississippi, on February 18 and 19, 1982. Upon the entire record, including briefs filed by the General Counsel and Respondent, and upon my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with an office and place of business in Golden, Mississippi, where it is engaged in the manufacture of clothing. Respondent annually sells and ships from its Golden, Mississippi, facility products, goods, and material valued in excess of $50,000 directly to points outside the State of Mississippi, and annually purchases and receives, at said facility, products, goods, and materials valued in excess of $50,000 directly from points outside the State of Mississippi. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The pleadings establish and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] All dates are in 1981 unless otherwise indicated.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Employment Histories of Szczepanski and Young—Szczepanski's Injury*

Young has been employed by Respondent several times in a variety of jobs.[2] Szczepanski filed an employment application with Respondent in November 1980, showing prior work experience as an electrode inspector for a battery manufacturer, and as a receptionist with filing and telephone answering duties.[3] Szczsepanski testified that she also did bookkeeping for the employer, but did not recall telling this to Respondent.

Szczepanski began working for Respondent on December 1, 1980, as a topstitch machine operator. According to Plant Manager James Fennell, she was then working in the department of Assistant Manager Clyde Moore.[4]

Szczepanski suffered a severe injury on her first day of work, December 1, 1980, and severed a portion of her right ring finger. She received surgical treatment which re-attached the part that had been cut off. Subsequent to the accident, Szczepanski executed a sick leave form granting her sick leave from January 5 until February 2.[5] Her doctor had not released her by the time her leave expired, and Szczepanski executed another leave form, lasting an additional month.

Szczepanski was released by her doctor during February, and returned to work. Assistant Manager Moore asked her whether she wanted to go back on another machine, and Szczepanski replied that she did not want to do so, since machines made her nervous. Accordingly, Respondent put Szczepanski to work marking buttons for coats, and, thereafter, performing a bundle job. Alleged Supervisor Marjorie Grist[6] told Szczepanski that

[2] Young engaged in various machine operator functions—tacking button tabs, leg flaps, and knit collars. Her last job, just prior to her sick leave and discharge, was tacking button hole collars. She had also done inspecting work.

[3] Resp. Exh. 13.

[4] The pleadings establish and I find that Fennell and Moore were supervisors within the meaning of the Act.

[5] G.C. Exh. 2. The form states Szczepanski's understanding that her leave would end on February 2. The following language also appears on the form:

> I understand that at the expiration date of this leave if I am not able to return to work it shall be my responsibility to request an extension to this leave in writing at least five working days prior to expiration of this leave and such a request shall set forth the reason therefor. I understand in the event that I fail to make a written request for an extension on [sic] this leave or fail to report to work on the first working day following the expiration of this leave that I will be deemed to have quit unless a reasonable excuse is offered within four working days for neglecting to give notice or failing to report on the first working day following the leave.

[6] The supervisory structure below Plant Manager Fennell consisted of three assistant managers and several line supervisors. The complaint alleges that Plant Manager Fennell, Assistant Manager Mike Byram, and all the line supervisors were supervisors within the meaning of the Act. Respondent's answer admits Fennell's, Mike Byram's, and Clyde Moore's supervisory status—the latter being an "assistant manager" instead of a line supervisor as alleged in the complaint. All other supervisory allegations are denied, including the allegation relating to Marjorie Grist. However, Fennell testified that Grist was an assistant manager, not a line supervisor as alleged in the complaint. Assistant managers have authority to assign work, issue reprimands, and evaluate discharge recommendations

Continued

she could stay on the bundle job until the employee performing that work, Larry Young, came back from sick leave. Young did return, and was given his old job. Szczepanski was then put in the camouflage department, pulling cords.

Szczepanski's work after her return from sick leave was performed in a different department from the one to which she had previously been assigned, under a different assistant manager (Byram). Although Respondent assertedly had a policy against interdepartmental transfers, Plant Manager Fennell said that the Company made an exception in Szczepanski's case because it "owed [her] something" in light of her injury.

B. *Young's and Szczepanski's Participation in the Union Campaign—Respondent's Reaction*

Union activities among Respondent's employees began in early March. Young and Szczepanski were active supporters of the Union. Both employees solicited employee signatures on union authorization cards, while Szczepanski also handed out union buttons. Young obtained her signatures in the employees' lobby during nonworking time. The alleged discriminatees attended union meetings, and wore union buttons on their clothing while at work. Supervisor Mike Byram testified that he knew about Szczepanski's union "involvement," while Fennell said that he knew that both Young and Szczepanski wore union buttons.

Young testified without contradiction that, shortly after the first union meeting, Fennell called a meeting of the employees in Young's department. The plant manager said that there were union pushers in the plant, that the Golden family did not need them, and that he would do anything he could to stop them. Fennell asserted that employees had been harassed, and that if they signed union cards the latter could be "used against them" in the same way that a blank check could be used.

C. *The Discharge of Young*

1. Young's attempt to return to work after sick leave

Young experienced some medical problems concerning her heart and went on sick leave. She signed a sick leave form which began her leave on March 30 and ended it on April 27 (G.C. Exh. 6). As shown above, Respondent's standard leave of absence form contains a clause stating that the employee will be deemed to have quit "unless a reasonable excuse is offered within four working days for neglecting to give notice or failing to report on the first working day following the leave."[7] Grist told Young when she went on leave that the Company could not hold her job for her.

On April 24, 3 days before expiration of her leave, Young was released by her doctor, and went to the plant the same day (G.C. Exh. 7). She was wearing her union button. Another employee whom Young knew was operating the machine at which Young formerly worked. This employee's regular job was that of "repair lady," according to Young. Fennell corroborated this testimony, but asserted that the "repair lady" did "an hour maybe a day."

Young gave her medical release to her line supervisor, Myra George, who told her to give it to Assistant Manager Marjorie Grist. The latter read the release, and then told Young that she would speak with Plant Manager Fennell. Grist returned in a few minutes, and told Young that Fennell had spoken with Clyde Moore and Mike Byram, the other assistant managers, but that he did not have any work in the factory for Young. Grist told Young that she could sign another leave, but Young demurred, saying that she needed work because of her medical bills.

Young told Myra George that she was going to apply for unemployment benefits. George said that she hated to see Young "quit." The latter replied that she was not quitting, but merely applying for unemployment benefits until the Company had "something open for [her]." Respondent thereafter failed to put Young back to work and then discharged her, asserting various rules and policies as its reasons.

2. The alleged rule against interdepartmental transfers

Plant Manager Fennell testified that he knew on April 24 that Young was able to work, and that her visit to the plant that day constituted sufficient notification thereof to the Company. However, Fennell contended that Young's job had been filled, and that there was no other work for her that day in Grist's department. The plant manager conceded that there was work for Young in Byram's and Moore's departments. However, Fennell contended that he did not consider Young for any of these positions because of a company policy against interdepartmental transfers, despite the fact that the jobs in the different departments were similar. This policy, Fennell stated, was mandated because of the necessity of fixing departmental responsibility upon each assistant manager.

On the other hand, Fennell also said that there were exceptions to this rule "under special circumstances." Thus, one employee, Martha Leathers, was returned to work in a different department because she was able to "sew seat patches," a skill in demand, according to Fennell. The same consideration was given to Vera Mae Holcomb because she had the "very skilled skill" of "felling." Pamela Brewer went on sick leave on February 2, and extended it for a second month. Fennell testified that Brewer's mother asked the Company to give Brewer "a chance to try again," and, for this reason, Brewer was returned to a different department. Finally, Szczepanski, after her first sick leave (and pior to her union activities), was returned to a different department because the Company felt it "owed" her something.

I conclude that Respondent's alleged rule against interdepartmental transfers either did not exist, or could be waived by the Company at will, without any clearly defined reasons. I infer from Fennell's testimony that

made by line supervisors, according to Fennell. In light of this authority, and Respondent's admission that Assistant Managers Byram and Moore were supervisors, I conclude that Assistant Manager Grist was also a supervisor within the meaning of the Act.

[7] *Supra*, fn. 5.

Brewer was an unsatisfactory employee, and was given another "chance" in a different department solely because of her mother's request. There was no business reason for the rule against interdepartmental transfers since the assistant managers exercised authority in their own departments over new hires, transferred employees, and old employees, while the jobs in the different departments were similar.

3. Respondent's application of the 4-day reporting rule

As described above, Respondent's leave form contains a clause requiring an employee returning from leave to give "a reasonable excuse . . . within four working days for neglecting to give notice or failing to report on the first day following the leave."[8] Fennell testified that the purpose of this rule is to enable the Company to know the status of employees, and to keep its records in proper order.

As already related, Young appeared at the plant with a medical release on April 24, a Friday, and asked for work 3 days before expiration of her leave on April 27, the following Monday.[9] Fennell acknowledged that this constituted "sufficient notice" of Young's availability for work and her status "at that time." However, since she did not report on the "first working day following expiration of [her] leave," i.e., on April 28, and the Company "had no word from her," according to Fennell, Young was "terminated" on May 1, and was no longer considered for any position. She was not given any termination notice.

The first observation on Respondent's action is that Fennell did not follow the letter of his own rule. The clear meaning of that rule is that an employee is to have four full working days after the expiration of leave in which to provide an excuse for failure to report on the first day following leave. This means that the employee has until the close of busines on the fourth day in which to provide the excuse. Fennell did not give Young a full 4-day grace period. Instead, he considered her to have been terminated *on* May 1, the fourth day following expiration of her leave.

Fennell did not explain why he had to "terminate" Young, since under the rule she was deemed to have "quit." More fundamentally, Young's appearance at the plant with a medical release on Friday, April 24, asking for work, was sufficient to apprise the Company of her "status." She had recovered and was ready for work. Fennell's comment that he only knew her status "at that time," suggesting that he did not know it the following Tuesday, is mere sophistry. His application of the 4-day rule in Young's case was arbitrary, and was not required by the Company's stated reason for the rule. Respondent provided no evidence of the rule's application in other cases, and I do not credit Fennell's testimony that it was so applied.

4. Availability of work which Young was qualified to do between April 24 and May 1

Respondent's records show that it hired six new employees on April 29 and 30; i.e., within the 4-day grace period which Respondent's rule allowed to Young (G.C. Exh. 8). Fennell and Young both testified that she could have performed one of these jobs, "button hole fly," while Fennell added that Young could have performed the "attach socket" job, which became available on April 30. Young testified that there were other new jobs after May 1 which she could have filled, and identified them on Respondent's records. Fennell testified that some sewing jobs were filled after May 1 by employees with no experience whatever. He conceded that the Company hired new employees for work which Young could have done.

I conclude that there was work at Respondent's plant between April 24 and May 1, and thereafter, which Young was qualified to do.

5. Young's remaining visits to the plant

Since Young did not receive a separation notice from the Company, she continued to come to the plant on 2 Fridays after her termination, in order to make her insurance payments to the personnel secretary. Young sent her daughter on the third Friday, but the payment was not accepted on the ground that Young had been terminated.

D. *The Discharge of Szczepanski*

1. Szczepanski's second sick leave and attempt to return to work

Szczepanski required supplemental surgery on her finger, and again went on sick leave, in early April. On May 12, her doctor wrote the Company that a final followup visit on May 6 showed that Szczepanski had a 26-percent impairment of her right ring finger, a 3-percent impairment of the hand itself, and a 2-percent impairment "of the whole man" [sic] (G.C. Exh. 12).

Szczepanski returned to the plant, on or about May 11, wearing her union button, and asked Supervisor Mike Byram for work. As in Young's case, she was not returned to work and was ultimately discharged, for a number of asserted reasons.

2. Company policy when an employee returns from leave

According to Byram, whom I credit, Szczepanski said that she did not want a "machine job."[10] Byram told her that he had no work for her. He asserted at the hearing that he had sewing jobs available at the time, but no nonsewing work except a bundling job involving bundles weighing 40–50 pounds. Szczepanski was not returned to her last job because another employee had been hired to fill that position, according to Byram.

[8] *Ibid.*

[9] I take judicial notice of the fact that April 24, 1981, fell on a Friday, and that April 27 fell on a Monday.

[10] Szczepanski testified that she could not remember whether she expressed a disinclination for a machine job after her second sick leave, although she agreed that she had done so after her initial absence and surgery.

On the issue of Szczepanski's right to her former job, Fennell identified a document, dated May 2, 1976, as Respondent's written leave of absence policy. This document states that an employee on leave for less than 6 months shall be returned to his former job if it is "still in operation" (G.C. Exh. 3). However, Fennell asserted that this policy had been changed, and that a returning employee went back to his old job only if it was not filled by another employee.

Employee Tammy Cox, who was not a union adherent and did not wear a union button, was employed as a metal eyelet machine operator. Cox testified that she returned from sick leave on May 11, the same day that Szczepanski attempted to return. During her absence another employee whom she identified as "John" had been placed on her job. When Cox returned, she was given her old job, and the other employee was "transferred to a snap machine." Cox testified that she knew this because she saw the other employee when he went to the new job.

Fennell, on the other hand, asserted that a "Johnny Wilson" had previously been employed on an "attach socket" job. Wilson requested return to an opening in his former job, and the Company complied with this request, thus creating an opening for Cox in *her* former job. Had Wilson not made this request, according to Fennell, Cox would not have been able to return to her old job, and would not have been employed absent other suitable work.

I credit Cox's testimony that her replacement was transferred to work on a snap machine, and reject Fennell's assertion that he went back to an attach socket job. Cox was testifying about only one event, which she "saw." As a current employee of Respondent, her testimony has great reliability. *Gold Standard Enterprises*, 234 NLRB 618 (1978). I consider her to be a more trustworthy witness than Fennell, whose interest was to establish that the company policy on employees returning from leave, as stated in a company document, was not really being followed. Fennell's testimony on what *would have happened* to Cox if Wilson had not made the alleged request is entirely speculative, and I give it no weight.

Other testimony from Fennell as he was confronted with Respondent's leave records, and the records themselves (G.C. Exh. 9), establish that numerous employees returned from leave either to their former jobs or to other jobs. When Szczepanski herself returned from surgery after her first sick leave—prior to her union activity—she was given a bundle job, but was required to move to another job when the employee formerly holding that position, Larry Young, returned from his leave.

Based on this evidence, I do not credit Fennell's testimony alleging a change in the Company's written policy concerning employees returning from leave. That policy, I find, was to place the returning employee in the same or another job, if necessary transferring substitutes in those portions to still other jobs. Szczepanski had a nonsewing job prior to her second sick leave, but Respondent failed to return her to this job, or another such job, contrary to its own policy.

3. The availability of other work which Szczepanski was qualified to do

Szczepanski was not tested for any job, and was not informed that the Company did not consider her qualified to fill them. Respondent's records show that between May 11 and June 15 when, Respondent asserts, it learned of Szczepanski's other employment and decided to terminate her, the Company filled one quality control job, three inspection jobs, one time worker job, one turn facing job, one bookkeeping job, and five bundle jobs (G.C. Exh. 8). Fennell testified that he did not place Szczepanski in the quality control job because it was a specialized, clerical job, and did not consider her for the inspection or turn facing jobs because they required the use of "snips," a small scissor-like device. Although Fennell said that he did not know whether Szczepanski could use snips, he considered that her impairment disqualified her. The plant manager said that some of the bundle jobs were too heavy for Szczepanski, while a light bundle job was given to the son of a company line supervisor.

Szczepanski, on the other hand, testified that she was capable of performing the duties of the inspecting, turn facing, bookkeeping, and light bundle jobs. She affirmed that she had no trouble using snips to cut tags from bundles during her short stint on a bundle job, when she returned from surgery after her first sick leave. At the hearing, Szczepanski demonstrated ability to use a pair of snips. It was apparent from her demonstration that only the thumb and first finger are involved, whereas Szczepanski's impairment is to the fourth, or ring finger (of her right hand), which she cannot bend fully so as to make a fist. Szczepanski credibly testified that her finger was in the same condition at the time of her attempt to return to work as it was at the time of the hearing.

As in Young's case, Fennell agreed that he hired new employees, after Szczepanski's discharge, for work which she could have done. I conclude that, at the time of her attempt to return to work on or about May 11, and continuing to her discharge on or about June 15 and thereafter, Respondent had job openings which Szczepanski was qualified to fill, but which it did not offer to her.

4. Szczepanski's discharge—the alleged rule against other employment while on layoff

According to Szczepanski, whom I credit, Byram told her on May 11 that he had sent her another leave form, and asked her to sign one. Szczepanski declined, saying that she needed work. She returned a week or two later for a workmen's compensation form, and Byram again asked her to take a leave slip or layoff slip. Szczepanski went back a third time on or about June 2, and Byram made the same requests, with the same response from Szczepanski. Byram said that he did not know what she thought the Company was "trying to pull." Szczepanski replied that she did not know what the Company thought it was "trying to pull," but that she needed work. Byram then gave her a layoff slip dated June 2 (G.C. Exh. 5), and told her that there probably would no work for 3 months.

Sometime in June, Szczepanski took a part-time job at Coleman's Barbecue, a restaurant. She testified that her line supervisor at Respondent's plant saw her working at the restaurant. On June 15, Respondent's secretary entered a note in Szczepanski's personnel file stating that Assistant Manager Byram called Coleman's and learned that Szczepanski had been working there for 2 or 3 weeks (Resp. Exh. 5). Respondent then terminated Szczepanski, because "no work was available," and backdated the termination date to June 3, the date of the layoff (G.C. Exh. 5). Fennell could give no reason for backdating the discharge.

Fennell asserted that Szczepanski was discharged because she obtained other employment while on layoff. The plant manager said that discharge under these circumstances was required by company policy. He expects employees on indefinite layoff to draw unemployment compensation benefits rather than work on another job. Nonetheless, Fennell testified that employees were not aware of this policy, although "in ways, they are aware of company rules." However, the Company has an employee handbook which is not distributed to all employees, according to the plant manager. Szczepanski was not informed of the rule at the time she was placed on layoff status. Supervisor Mike Byram testified that he informed employees about the rule against employment while on layoff only "if they ask about it."

In the following month, July, Fennell wrote a memorandum of the circumstances of Szczepanski's discharge. Although the memorandum is difficult to understand,[11] it is clear that there is no reference to Szczepanski's work on another job as the reason for her termination. Fennell testified that he was sure, when he wrote this memorandum, that he recalled Szczepanski's work at Coleman's Barbeque as the reason for her discharge. However, he did not put it in the memorandum. In the same month, on July 6, Respondent's counsel sent the Board a statement of position affirming lack of suitable work as the reason for Szczepanski's termination, without any reference to her work at Coleman's Barbeque (G.C. Exh. 11). The work at Coleman's Barbeque, as the reason for Szczepanski's discharge, was first advanced at the hearing.

Respondent's asserted reasons for Szczepanski's discharge are so contradictory as to be incredible. Respondent's counsel contends that its letter to the Board, failing to mention the work at Coleman's Barbecue, does not constitute evidence that the Company is presenting "a shifting defense." Rather, counsel argues, it shows "inadequate communication between counsel and Respondent."[12] However, this answer does not explain why Fennell, writing a memorandum about Szczepanski's discharge 1 month after the event, failed to put down the alleged reason, although he said that he remembered it. It does not explain how the Company could reasonably have expected employees on layoff status, like Szczepanski, to follow a policy which it never communicated to them. How could Byram expect employees to "ask about" a rule which had not been announced? Fennell's testimony about an employer handbook (presumably containing company rules and policy), which was not distributed to the employees whom it was intended to inform, stretches credulity past the breaking point.

Fennell's view that an employee on indefinite layoff can neither work at the Company nor at any other job, without being terminated, recalls the fable of the dog in the manger. The plant manager's preference in these circumstances for the payment of unemployment insurance benefits, rather than the employee's gainful employment at another job, does not serve the public interest. It is also contrary to Respondent's interest since, as Fennell admitted on cross-examination, the payment of benefits increases the employer's insurance costs.

Because of these contradictions, I reject Respondent's asserted reasons for Szczepanski's discharge as complete fabrications.

E. *Respondent's Additional Evidence*

The Company introduced evidence pertaining to the termination of seven other employees in an attempt to establish that its terminations of Young and Szczepanski were in accordance with established company policy. Thus, Fennell testified that employees Larry Wigginton and Wade Wigginton were terminated after sick leave because they were unable to do any kind of work. Elwando Cook was discharged after the Company saw that she would never be able to do any work because of a back injury. Jean Standifer was terminated while working because, the Company told her, it had "no suitable work available." Debra Fowler and Louise Credille were let go because there was no work available for them. Wanda Wigginton refused her former job, and no other work was available. Finally, Judy Wells was discharged because she obtained other employment while on sick leave.[13]

None of these examples applies to Young or Szczepanski. There *were* jobs available for them which they were able to perform, and neither of them refused a job.

F. *Legal Analysis*

It is clear that Respondent knew that Szczepanski was engaged in union activities, and that she and Young were union sympathizers. It is also clear that Respondent opposed the union campaign, since Fennell told employees that he would do anything he could to stop the "union

[11] Fennell's memorandum reads:

> Sally Szczepanski, Clock #584, took a leave of absence on 4/6/81 to have surgery performed on her finger which was injured on a previous job here. She was released to return to work on 5/11/81 by the doctor. She refused to take a job on a sewing machine and at that time we told her we did not have a non-sewing job. She did want her leave continued so she was terminated on 6/2/81. [G.C. Exh. 10.]

[12] Resp. br., p. 28.

[13] Wells' case is unlike Szczepanski's, who was assertedly discharged for finding other employment while on layoff status. Assuming *arguendo* that Fennell should be credited on these matters, the case of an employee who *voluntarily* goes on sick leave representing that he is ill, and then obtains other employment, is entirely different from that of an employee like Szczepanski, who was *involuntarily* laid off, told that there would be no work for 3 months, and only then obtained other employment.

pushers" in the plant. Respondent argues that Fennell's speech was lawful, and notes that there are no allegations of independent 8(a)(1) violations in the complaint.[14] However, this argument is not dispositive of the issue, nor are independent unfair labor practices required to establish union animus. Such unfair practices may give rise to an inference of animus, and this is the usual way in which it is established. However, an employer's opposition to union organization of its employees may be stated explicitly, as Fennell did in this case. His expressed opposition to the "union pushers" establishes company animus against the Union despite the obsence of independent violations of the Act. *Wright Line*, 251 NLRB 1083, 1090 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).

The record shows the Company's disparate or arbitrary application of rules and alleged rules against union activists Young and Szczepanski. And, where an express rule favored these employees, Respondent simply fabricated evidence of a contrary policy. Thus, under the Company's written rule which returned an employee on leave for less than 6 months to his or her former job if it was "still in operation," Szczepanski would have been entitled to go back to her nonsewing job after her second sick leave. Respondent, however, attempted to establish the existence of a different policy, i.e., such right of return did not exist if the former job was occupied by another employee. The credited evidence, however, shows that Respondent gave employees returning from leave (within 6 months) their former or different jobs. Szczepanski was thus entitled under actual company practice to her former or another job among existing vacancies, for some of which she was qualified. She received neither of these.

The Company's treatment of Szczepanski after her second sick leave was not only different from that which it administered to other employees, but it was also different from the manner in which it dealt with Szczepanski after her first sick leave. At that time it gave her employment because it "owed" her something, but apparently did not feel the same after her second sick leave. The only factual difference was that Szczepanski, in the meantime, had engaged in union activity. Respondent's inconsistencies in the reasons it has given for Szczepanski's discharge are set forth above.

Young also was entitled to her former job or to other available jobs for which she was qualified. Although Young's former job was filled by a "repair lady" at the time she returned to the plant with a medical release on April 24, 3 days before expiration of her leave, Respondent did not return her to this job, and attempted to establish a rule against interdepartmental transfers to justify its admitted refusal to give Young other available jobs for which she was qualified. As shown above, this attempt was unsuccessful. Finally, to justify its discharge of Young, the Company simply ignored the fact that she had returned asking for work, and applied its 4-day reporting rule in a manner which was both arbitrary and artificial, and which was actually contrary to the literal language of the rule.

[14] Resp. br., pp. 2-3.

It is established law that an employer's disparate treatment of union activists like Young and Szczepanski constitutes evidence that its discipline of them was discriminatorily motivated.[15] This is also true with respect to the shifting reasons Respondent has advanced for Szczepanski's discharge. In addition, the timing of Respondent's discipline—immediately following the employees' participation in union activities—suggests that it was motivated by those activities.

Although the complaint alleges that Szczepanski was discharged on June 2, she was actually laid off on May 11, when she returned from her second sick leave and was denied employment for the same discriminatory reasons which caused her later discharge. Respondent's treatment of Szczepanski's—from May 11 with its refusal to give her work, through her layoff on June 2 and her discharge on June 15 backdated to June 2—consists of interrelated events all of which were thoroughly litigated. Accordingly, a finding that Respondent unlawfully laid off Szczepanski on May 11, and then discharged her, is warranted under established law.

Somewhat similar reasoning applies to Young's case. Although the complaint alleges that she was discharged on April 24, Respondent's discipline on that date actually constituted a layoff, with the discharge taking place on May—both actions being engaged in by Respondent for discriminatory reasons.

The General Counsel has thus proved by the preponderance of the evidence that Respondent laid off and then discharged both Young and Szczepanski because of their union activities, in violation of Section 8(a)(3) and (1) of the Act. Respondent's attempted rebuttal of the General Counsel's case was completely unpersuasive, and, accordingly, I conclude that Respondent has violated the Act as herein described.

In accordance with my findings above, I make the following:

CONCLUSIONS OF LAW

1. Golden Manufacturing Co., Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. By laying off Donna Young on April 24, 1981, and thereafter discharging her on May 1, 1981, and by laying off Sally Szczepanski on May 11, 1981, and thereafter discharging her on June 2, 1981, in each instance because of said employee's union activities, Respondent thereby engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

4. The foregoing unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[15] *NLRB v. Magnesium Casting Co.*, 668 F.2d 13 (1st Cir. 1981), enfg. 250 NLRB 692 (1980); *Head Division, AMF v. NLRB*, 593 F.2d 972 (10th Cir. 1979), enfg. 228 NLRB 1406 (1977).

THE REMEDY

It having been found that Respondent has engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act. Thus, it having been found that Respondent unlawfully laid off Donna Young on April 24, 1981, and thereafter discharged her unlawfully on May 1, 1981; and unlawfully laid off Sally Szczepanski on May 11, 1981, and thereafter discharged her unlawfully on June 2, 1981, it is recommended that Respondent be ordered to offer each employee immediate and full reinstatement to her former position or, if such position no longer exists, to a substantially equivalent position without prejudice to her seniority or other rights and privileges, dismissing if necessary any employee hired to fill said position, and to make her whole for any loss of earnings she may have suffered by reason of Respondent's unlawful conduct, by paying her a sum of money equal to the amount she would have earned from the date of her unlawful layoff to the date of an offer of reinstatement, less net earnings during such period, with interest thereon to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[16]

It is also recommended that Respondent be required to post appropriate notices.

Upon the foregoing findings of fact, conclusions of law, and the entire record,[17] I recommend the following:

ORDER[18]

The Respondent, Golden Manufacturing Co., Inc., Golden, Mississippi, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in the Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, or any other labor organization, by laying off or discharging employees because of their union activities, or by discriminating against them in any other manner with respect to their hire, tenure, or terms or conditions of employment.

(b) In any other like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer Donna Young and Sally Szczepanski immediate and full reinstatement to their former positions or, if either such position no longer exists, to a substantially equivalent position, without prejudice to their seniority or other rights and privileges, discharging if necessary any employee hired to replace either of them, and make each of them whole for any loss of earnings she may have suffered by reason of Respondent's discrimination against her, in the manner described in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its plant in Golden, Mississippi, copies of the attached notice marked "Appendix A."[19] Copies of said notice, on forms provided by the Regional Director for Region 26, after being duly signed by Respondent, shall be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 26, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[16] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[17] The General Counsel's unopposed motion to correct the official transcript, attached hereto as Appendix B, is hereby granted [omitted from publication].

[18] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[19] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."